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No. 88-1775

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY
COMMISSION OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. RESPONDENT HAS EFFECTIVELY CONCEDED THAT UNLESS PETITIONER'S TRUTHFUL STATEMENT THAT HE HAS BEEN CERTIFIED BY NBTA IS "NECESSARILY" AND "INEVITABLY" MISLEADING, THE BLANKET PROHIBITION OF THAT STATEMENT VIOLATES THE FIRST AMENDMENT. THE STATEMENT ABOUT NBTA CERTIFICATION ON PETITIONER'S LETTERHEAD CANNOT PLAUSIBLY BE HELD TO BE NECESSARILY AND INEVITABLY MISLEADING	2
II. PETITIONER'S STATEMENT ABOUT NBTA CERTIFICATION WAS NOT COMMERCIAL SPEECH	7
A. The Issue Whether Petitioner's Statement Is Commercial Speech Is Properly Before The Court	8
B. Petitioner's Statement About NBTA Certification Is Not Commercial Speech	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:

Page

<i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 347 (1936)	7
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977)	2
<i>Board of Trustees of the State University of New York v. Fox</i> , 109 S. Ct. 3028 (1989)	11, 14
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1983)	12, 14
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	14
<i>Central Hudson Gas and Elec. v. Public Service Comm'n of New York</i> , 447 U.S. 557 (1980)	10
<i>Dewey v. Des Moines</i> , 173 U.S. 193 (1899)	10
<i>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	11
<i>Ex Parte Howell</i> , 487 So.2d 848 (Ala. 1986)	4
<i>Friedman v. Rogers</i> , 440 U.S. 1 (1978)	11, 12, 13
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	10
<i>In re Johnson</i> , 341 N.W.2d 282 (Minn. 1983)	4
<i>In re R.M.J.</i> , 455 U.S. 191 (1982)	2, 6
<i>Jenkins v. Georgia</i> , 418 U.S. 153 (1974)	8
<i>McGoldrick v. Compagnie Generale Transatlantique</i> , 309 U.S. 430 (1940)	9
<i>New Jersey v. Portash</i> , 440 U.S. 450 (1979)	8
<i>Ocala Star-Banner Co. v. Damron</i> , 401 U.S. 295 (1971)	8
<i>Riley v. National Federation of the Blind of North Carolina</i> , 108 S. Ct. 2667 (1988)	14
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	10
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	12
<i>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1980)	11
<i>Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio</i> , 471 U.S. 626 (1985)	6, 7

STATUTORY AND REGULATORY PROVISIONS:

D.R. 2-105 (a)	passim
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GARY E. PEEL,
 v. *Petitioner,*
 ATTORNEY REGISTRATION AND DISCIPLINARY
 COMMISSION OF ILLINOIS,
Respondent.

 On Writ of Certiorari to the Supreme Court of Illinois

 REPLY BRIEF

At issue in this case is the constitutionality of a decision by the State of Illinois to censure petitioner for placing on his letterhead the truthful statement that he is certified as a civil trial specialist by the National Board of Trial Advocacy ("NBTA"). Petitioner and numerous *amici*, including the Federal Trade Commission, have demonstrated that petitioner's statement about NBTA certification is worthy of First Amendment protection because it helps potential clients overcome "informational shortcomings that obscure differences in the experience, knowledge and skills" of attorneys.¹ It also furthers

¹ Brief Amicus Curiae for the Federal Trade Commission at 19.

Petitioner also contends that the application of Disciplinary Rule 2-105(a)(3) ("D.R. 2-105") violates the Equal Protection Clause of the Fourteenth Amendment.

weighty public interests in access to the courts, the sound administration of justice, and vindication of important rights. Without contesting that this expression is valuable, respondent nonetheless contends that it is wholly outside the protection of the First Amendment and can therefore be banned. This argument cannot withstand scrutiny.

I. RESPONDENT HAS EFFECTIVELY CONCEDED THAT UNLESS PETITIONER'S TRUTHFUL STATEMENT THAT HE HAS BEEN CERTIFIED BY NBTA IS "NECESSARILY" AND "INEVITABLY" MISLEADING, A BLANKET PROHIBITION OF THAT STATEMENT VIOLATES THE FIRST AMENDMENT. THE STATEMENT ABOUT NBTA CERTIFICATION ON PETITIONER'S LETTER-HEAD CANNOT PLAUSIBLY BE HELD TO BE NECESSARILY AND INEVITABLY MISLEADING.

Respondent does not even argue that D.R. 2-105 is narrowly tailored to further a substantial state interest,² and no such argument would be possible. The judgment of the Illinois Supreme Court censuring petitioner thus survives scrutiny only if respondent has carried its burden of proving that statements about attorney certification are so "necessarily" and "inevitably" misleading that they fall entirely outside the protection of the First Amendment. *See In re R.M.J.*, 455 U.S. 191, 202 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 372 (1977). That burden has not been met.

Respondent offers three arguments for finding all attorney statements about certification necessarily and inevitably misleading: (1) they "impinge[]" upon the inherent authority of the Supreme Court of Illinois to regu-

² See Brief for Respondent at 15-34. Because petitioner's statement about NBTA certification is not "commercial" speech, *see* Point II *infra*, respondent could not prevail even if it had shown that D.R. 2-105 meets this test for regulation of commercial speech.

late the practice of law"; (2) they imply that the state "has sanctioned" the certification; and (3) they "contain[]" information concerning the quality" of legal services. *See* Brief for Respondent at 16.

Impingement of state authority. Respondent's argument that certification by NBTA impinges state authority is without merit. NBTA certification does not impinge upon the authority of the Illinois Supreme Court to set requirements for admission to practice, or to establish disciplinary regulations for the profession. NBTA certification is entirely voluntary. It does not authorize certified lawyers to practice in any court in which non-certified lawyers may not appear, or to perform any task that noncertified lawyers may not perform. Furthermore, in States where state supreme courts have established their own specialty certification programs, lawyers must first be certified by those programs before they may be certified by NBTA. Brief for the National Board of Trial Advocacy as *Amicus Curiae* at 14. In any event, the inherent authority of state supreme courts to set standards for admission or discipline is limited by the Constitution. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (requirement of state residency for bar admission violates the Privileges and Immunities Clause, Art. IV, sec. 2).³

³ The Supreme Court of Illinois did not assert that "impinging the State's regulatory authority" and "implying state sanction" were separate grounds for finding statements about NBTA certification inherently misleading. The court's opinion makes clear that it considered the two to be synonymous. App. 9a. Respondent advances a somewhat different argument in positing "impinging the State's regulatory authority" as a ground separate from "falsely implying state sponsorship." Respondent contends that statements about NBTA certification impinge the State's regulatory authority because such statements substitute private for official authority in certifying specialists *and* because such statements implicitly attest to the superior qualifications of certified attorneys. Brief for Re-

State Sanction. Respondent's argument that statements about certification by the *National Board of Trial Advocacy* will "necessarily" and "inevitably" mislead potential clients into believing the *State* of Illinois endorses that certification is certainly not self-evident. Indeed, *amicus* Federal Trade Commission—the Nation's repository of expertise on misleading and deceptive trade practices—has concluded that respondent's argument is "implausible" because "it is highly unlikely that an attorney's truthful representation that he has been certified by the *National Board of Trial Advocacy* would mislead the public to believe his certification constituted some kind of state license to practice law." Brief for the Federal Trade Commission as *Amicus Curiae* at 25 n.23, and 22 (emphasis in original). Similarly, both of the other state supreme courts that have considered this issue found that statements about NBTA certification were not even potentially—much less inherently—misleading in this way.⁴

spondent at 24-25. These contentions simply restate the other justifications respondent has offered for D.R. 2-105's blanket prohibition.

Respondent's claim that "the inevitable result of petitioner's position would be the creation of a chaotic, unregulated system of civil litigation certification not sanctioned by the State," Brief for Respondent at 25, is unfounded speculation. Respondent advances no empirical support for this unlikely scenario. More importantly, this is not an argument that statements about NBTA certification are misleading. It is an argument about the consequences of permitting claims about certification by private organizations—misleading or not. For this reason, the argument cannot justify a blanket prohibition of statements about NBTA certification on the ground that such statements are necessarily and inevitably misleading. Respondent has not tried to justify D.R. 2-105's blanket prohibition as a narrowly tailored means reasonably necessary to vindicate this purported interest in staving off chaos. Such an argument would be unavailing. Even in the unlikely event that respondent could make a plausible case for the asserted risk, a plethora of less restrictive options—including the regulatory approaches adopted in Minnesota and Alabama—could easily remedy this purported harm. See Brief for Petitioner at 26-29.

⁴ See *Ex Parte Howell*, 487 So.2d 848 (Ala. 1986); *In re Johnson*, 241 N.W.2d 282 (Minn. 1983).

Respondent has offered *no* empirical evidence to support its dubious *ipse dixit* argument.⁵

Nor has respondent even attempted to reconcile this argument with its own refusal in this case to find petitioner's letterhead statement misleading under D.R. 2-101 (b), which prohibits any public communication that fails to contain "all information necessary to make the communication not misleading."⁶ If petitioner's statement really was "inevitably" and "necessarily" misleading, his statement would also have violated that rule. Respondent cannot plausibly argue that petitioner's statement is inevitably misleading when respondent has itself concluded

⁵ Aside from a highly selective and misleading quotation from *Webster's Third New International Dictionary*, see Brief for the Federal Trade Commission as *Amicus Curiae* at 22-23 (setting forth full definition), the only source cited for respondent's position is a draft report of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, which stated that a claim of specialty by an attorney has "acquired a secondary meaning implying formal recognition as a specialist." App. 13a. This report cannot, however, bear the weight respondent places on it. First, the report identifies a risk that the public may be misled by a claim of specialization to believe that the specialist has been "formally" recognized when in fact he or she has not. In the present case, of course, petitioner *has* been "formally" recognized by a bona fide organization, NBTA. Even with respect to claims of specialization, the report does not state that potential clients will be misled into thinking that the "formal" recognition is by the State, rather than by a private credentialing organization. Second, the report identifies *no* empirical support for its conclusions, and petitioner is aware of no such evidence. Third, the report does not contend that statements concerning specialization would be misleading in states "which provide procedures for certification on recognition of specialization." App. 13a. Thus, the report does not contend, as does respondent, that statements concerning specialization are "necessarily" and "inevitably" misleading.

⁶ Petitioner was specifically charged with violation of this provision; indeed the ARDC Administrator argued that it was the most serious charged levelled against petitioner. App. 34a-35a.

that the statement did not violate D.R. 2-101—the rule specifically designed to prohibit misleading statements.⁷

Finally, respondent's argument completely ignores the test established by this Court, under which expression cannot be classified "inevitably" and "necessarily" misleading if it could be communicated in a nonmisleading manner. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (prohibition not permitted "if the information may also be presented in a way that is not deceptive"). Because the finding of the Illinois Supreme Court that petitioner's letterhead statement about NBTA certification was misleading rested largely on the proximity of that statement to statements about state licensure, a simple requirement that such statements be separated on letterhead would fully address the purported harm.⁸

Attorney Qualifications. Respondent has not even attempted to demonstrate that attorney statements about NBTA certification inevitably mislead potential clients about the experience and qualifications of those attorneys. Instead, respondent seeks refuge in the argument that, in

⁷ In contrast, D.R. 2-105 was designed to prohibit *all* statements concerning certification or specialization, whether misleading or not. The test of that rule does not require any showing that the statement is misleading. See Petition at 7-8; Brief for Petitioner at 28.

⁸ A disclaimer requirement, mandating the addition of specific language that Illinois does not require or endorse NBTA certification, might be an excessive burden on petitioner's expression. A state procedure for recognizing certifying organizations would fully satisfy the state's interest without requiring each individual statement to be accompanied by a disclaimer. See generally Brief *Amicus Curiae* of the American Advertising Federation, Inc., at 7 n.2, arguing that in some circumstances an unduly burdensome disclosure requirement could itself violate the First Amendment, a question left open in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 653 n.15 (1985).

That a State could avoid the risk it posits simply by requiring a disclaimer, however, illustrates that statements about certification are not inherently misleading.

general, factual statements implying anything about the quality of the professional services of an attorney are inherently misleading. As demonstrated, that argument is facially implausible. See Brief for Petitioner at 20-23. More importantly, the reasoning underlying that argument has been squarely rejected by this Court. The First Amendment does "not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 n.9 (1985). Petitioner's letterhead statement about NBTA certification as a civil trial specialist is an accurate and readily verifiable statement of fact regarding the nature of his practice. Accordingly, even if petitioner's statement is properly classified as commercial speech, it is precisely the type of expression this Court held the First Amendment protects in *Zauderer* and *In re R.M.J.*

II. PETITIONER'S STATEMENT ABOUT NBTA CERTIFICATION WAS NOT COMMERCIAL SPEECH.

Because petitioner's statement is protected even if it is "commercial" speech, the Court need not reach the broader issue whether petitioner's statement is properly classified as commercial speech. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The broader issue is, however, properly before the Court because it was raised and decided in the Supreme Court of Illinois. If this Court reaches the issue, petitioner's letterhead statement should be found fully protected because the statement does not itself propose a commercial transaction and was not made in the context of soliciting legal business or otherwise proposing a commercial transaction.

A. The Issue Whether Petitioner's Statement Is Commercial Speech Is Properly Before The Court.

The Supreme Court of Illinois necessarily decided that petitioner's letterhead statement was "commercial speech," and therefore could be banned pursuant to D.R. 2-105.⁹ Even respondent concedes that the judgment below rests on the "implicit determination that Petitioner's statement is commercial speech." Brief for Respondent at 6, n.1. Thus no jurisdictional bar precludes this Court from considering whether petitioner's letterhead statement can properly be classified as commercial speech. See *New Jersey v. Portash*, 440 U.S. 450, 455 (1979).¹⁰ Nor do any prudential considerations counsel against resolution of this issue. Petitioner never conceded that his letterhead was commercial speech. To the contrary, at every stage in the state proceedings he pressed the broader First Amendment argument.

Petitioner's motion to dismiss the ARDC proceedings claimed that application of D.R. 2-105 violated his right to "free speech, including commercial speech." At the ARDC hearing, petitioner specifically testified that he did not use the letterhead statement about NBTA certification as part of any direct effort to solicit new clients, that he had never used the statement in the yellow pages or brochures, and that he had never used the letterhead as part of any direct mail efforts. Hearing Transcript at 21-30; App. 25a-30a.¹¹

⁹ See Brief for the Federal Trade Commission as *Amicus Curiae* at 10 ("the state court necessarily decided . . . that the appropriate standard of review was that applied in assessing regulations of commercial speech, as opposed to noncommercial speech") (emphasis added).

¹⁰ See also *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971).

¹¹ Respondent's claim that petitioner "did not present evidence tending to show that his statement was not commercial speech," see Brief for Respondent at 8 n.1, simply ignores this uncontroverted testimony.

Nor did petitioner limit himself to commercial speech arguments before the Supreme Court of Illinois. The question he presented for review was "[w]hether the First Amendment to the United States Constitution prohibits a blanket prohibition on an attorney's office stationary designation which states the attorney is a 'Certified Civil Trial Specialist by the National Board of Trial Advocacy' when that designation is true." *Brief and Argument of Respondent* (Peel) in the Illinois Supreme Court at 3. His brief specifically argued that the expression at issue could not be banned because it was not part of an effort to solicit business:

there is a *grave difference* between placing the designation on the letterhead, which reaches generally only other lawyers, *present* clients, and others with whom the lawyer already conducts business, and the mailing of announcements indiscriminately or placing an ad in the telephone directory. In the latter . . . the sole purpose is to invite a relationship with a member of the general public [T]he state may have a more significant interest in protecting those intended recipients who may find the factor of certification designation important to their decision on which lawyer to choose, *but that justification is completely absent in Mr. Peel's case.*

Id. at 13 (emphasis added). Thus, petitioner squarely argued that the justification which permits States to regulate commercial speech by attorneys—i.e., solicitation of business—was "completely absent" in his case.¹² Any prudential requirement that issues be raised, as well as decided, in the state proceedings has therefore been satisfied. Cf. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

In any event, the issue whether petitioner's statement about NBTA certification can be classified as commercial

¹² This is the argument petitioner raised in Question II of the Petition, and the Court has granted review of that question.

speech is—at a minimum—a mere “enlargement” of the issue whether application of D.R. 2-105 to that statement violates the commercial speech principles elaborated by this Court. See *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899); cf. *Illinois v. Gates*, 462 U.S. 213, 246-253 (1983) (White, J., concurring in the judgment). The proper classification of petitioner’s statement is “so connected . . . in substance” with whether the statement was properly banned “as to form but another ground or reason for alleging the invalidity of the [lower court’s] judgment.” *Dewey v. Des Moines*, 173 U.S. at 197-198. Under these circumstances, this Court should have “no hesitation” to address the issue of how petitioner’s statement should be classified for First Amendment purposes. *Id.*¹³

Stanley v. Illinois makes clear that the Court can and should decide this issue. In *Stanley*, the Court set forth two conditions that permitted resolution of a particular equal protection challenge to state procedures, despite the petitioner’s failure to raise that challenge in the state court: (i) the case was decided on the “constitutional premise raised below”; and (ii) the result was reached “by a method of analysis readily available to the state court.” 405 U.S. at 658 n.10. These conditions are fully met here. The same “constitutional premise” is involved in both questions—that the First Amendment prohibits Illinois from ~~censuring~~ petitioner for placing on his letterhead an accurate statement about NBTA certification. And the method of analysis was readily available to the Supreme Court of Illinois. Petitioner pressed the argument that the First Amendment barred application of D.R. 2-105 precisely because petitioner’s letterhead was not used in the context of soliciting business.

¹³ Even if petitioner had characterized his letterhead statement as purely commercial speech, that characterization “clearly does not bind this Court in this new and evolving area of constitutional law.” *Central Hudson Gas and Elec. v. Public Service Comm’n of New York*, 447 U.S. 557, 581 n.4 (1980) (Stevens, J., concurring).

Accordingly, no jurisdictional or prudential consideration precludes the Court from deciding the proper First Amendment classification of petitioner’s letterhead statement.

B. Petitioner’s Statement About NBTA Certification Is Not Commercial Speech.

The Court’s recent decision in *Board of Trustees of the State University of New York v. Fox* explicitly “defines” commercial speech as “speech that proposes a commercial transaction.” 109 S. Ct. 3028, 3036 (1989). Contrary to respondent’s suggestion, petitioner does not contend that this definition should be applied woodenly to encompass only words that explicitly propose a commercial transaction. Petitioner has consistently acknowledged that expression can be classified as commercial speech if it either explicitly proposes a commercial transaction, or is made in the context of proposing a commercial transaction.¹⁴ “[B]y definition, commercial speech is linked inextricably to commercial activity.” *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979). This link provides the justification for permitting the States greater latitude to regulate. The commercial context both creates the incentive for misleading consumers and provides a financial motive diminishing the likelihood that valuable expression will be chilled. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976); cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion).

Petitioner’s statement cannot be deemed to be made in the context of proposing a commercial transaction simply because it appears in his letterhead. Many organizations that provide legal services but do not charge fees, such as the ACLU Foundation or the Washington Legal Foundation, routinely communicate with the public using their

¹⁴ Brief for Petitioner at 34; See Petition for Certiorari at 14-15.

letterheads. Inclusion of statements about certification in the letterheads of such organizations would in no sense be commercial speech. Respondent's argument on this point rests on a faulty analogy between letterhead and trade names of the type at issue in *Friedman v. Rogers*. A trade name can be regulated in all its uses because "[i]n each role, the trade name is used as part of a proposal of a commercial transaction." 440 U.S. at 11. Invariably, the Court found, use of a trade name involves "mere solicitation of patronage." 440 U.S. at 11 n.10. That link to solicitation is not invariably present with respect to attorney letterhead. Any such linkage depends on the context in which the letterhead is used.

Nor can petitioner's statement be classified as commercial speech merely because he ordinarily seeks remuneration for his legal services. See *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983); *Thornhill v. Alabama*, 310 U.S. 88 (1940). Much expression by attorneys—including articles in law reviews and speeches to bar associations or civic groups—may enhance professional status or business opportunities by demonstrating special knowledge or competence. Yet that expression is not "linked inextricably to commercial activity," and cannot be classified as commercial speech. *Friedman v. Rogers*, 440 U.S. at 10 n.9. The commercial benefits accruing to an attorney from such fully protected expression are merely incidental.

Nor can the use of letterhead by a private practitioner, without more, be deemed commercial speech. Any assumption of a predominantly commercial purpose is untenable where—as in this case—the letterhead statement merely accompanies communications to government authorities or to professional peers. In such circumstances a letterhead statement about NBTA certification could well be intended to convey, and be reasonably understood to convey, any number of messages unrelated to commercial activity. For example, such a statement could be intended

to convey a sense of pride in the accomplishment that NBTA certification connotes, or a personal endorsement of the certification process and the valuable goals NBTA certification furthers. It might be intended to encourage other attorneys to fulfill the requirements necessary for certification, or to educate readers about the fact of NBTA as a certifying organization. It could be intended to convey a professional interest in, and commitment to, improvement of the quality of advocacy through the certification process. Or—when used by a prominent local practitioner such as petitioner—the inclusion of a statement about NBTA certification could be intended to legitimate the certification process as a proper activity for leaders of the profession.

Although no simple litmus test defines when attorney expression may be regulated as commercial speech, the concept of "solicitation"—as understood in the context of the ethical constraints on lawyers—provides a touchstone for deciding when expression by an attorney is primarily for the purpose of proposing a commercial transaction and may therefore be classified as commercial speech. Cf. *Friedman v. Rogers*, 440 U.S. at 11 n.10 (trade name involves "mere solicitation of patronage"). Statements made in the context of solicitation of potential clients would ordinarily be considered "commercial" speech. Under this standard, expression contained in a letterhead could be regulated as commercial speech if the expression occurs in the context of solicitation.

As demonstrated, the record in this case does not support an inference that the letterhead was used, either explicitly or implicitly, in the context of proposing a commercial transaction or relationship. See Brief for Petitioner at 33-37. Respondent has made no showing that any commercial benefit accrued to petitioner as a result of his letterhead statement about NBTA certification. Any such benefit would have been wholly incidental to the other purposes animating his communications with the ARDC and his professional peers. Accordingly, his state-

ment was entitled to the full protection of the First Amendment.¹⁵

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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¹⁵At a minimum, petitioner's letterhead statement should be found to be fully protected because its predominant purpose was not commercial. This Court has made clear that when expression combines commercial and noncommercial elements, the proper First Amendment classification of the expression depends on its predominant purpose. *Riley v. National Federation of the Blind of North Carolina*, 108 S. Ct. 2667 (1988); *Bolger*, 463 U.S. at 62-64.

Even if petitioner's statement was commercial speech, D.R. 2-105 should still be invalidated in this case on grounds of substantial overbreadth. The literal terms of D.R. 2-105 preclude an attorney from making any public statement that he or she is certified—irrespective of the context. As the discussion in text makes clear, this regulation prohibits a substantial amount of fully protected expression. See *Fox*, 109 S. Ct. at 3038-3039; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).